No. 82-11

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

1982 TERM

MENNONITE BOARD OF MISSIONS ..... Appellant

v.

RICHARD C. ADAMS ..... Appellee

APPEAL FROM THE INDIANA COURT OF APPEALS

BRIEF OF APPELLANT

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QUESTIONS PRESENTED

Whether the Indiana Tax Sale Statutes[1] specifically Ind. Code §6-1.1-24-3 and §6-1.1-24-4, are violative of the Due Process Clause of the Fourteenth Amendment of United States Constitution because those statutes only provide for notice by publication to a mortgagee of a pending tax sale.

Whether Ind. Code §6-1.1-25-6 is violative of the Due Process Clause of the Fourteenth Amendment of United States Constitution because no notice is given to a mortgagee prior to the expiration of the

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[1]The Indiana Court of Appeals in this case referred to these statutes as the Tax Sale Statutes. See Jur.St.App. p. 17 fnl.

redemption period, which results in the State taking the Mennonite Board of Missions' property without notice or compensation.

Whether the Indiana Tax Sale Statutes are violative of Equal Protection of the Fourteenth Amendment of United States Constitution as applied because they provide for notice to "owners" by mail, and no similar requirement exists to notify mortgagees of record.

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JURISDICTION AND OPINIONS BELOW

The opinion of the Indiana Court of Appeals, from which the Mennonite Board of Missions appeals appears in the Appendix to the Jurisdictional Statement, thereto, pp. 17-29, and is reported at Ind. App., 427 N.E.2d 686 (1981).

The judgment of the Indiana Court of Appeals was entered on October 29, 1981. Appellant filed a Petition for Rehearing before the Indiana Court of Appeals on November 18, 1981, which was denied on December 8, 1981. Appellant filed a Petition for Transfer to the Indiana Supreme Court on December 24, 1981, which was denied on April 13, 1982.

The Mennonite Board of Missions timely filed a Notice of Appeal to the United States Supreme Court with the Clerk of the Indiana Supreme Court and Court of Appeals on May 25, 1982. This same notice was

sent to the Attorney General of the State of Indiana who was not a party to this action, but who may have an interest pursuant to 28 U.S.C. §2403(b).

The Mennonite Board of Missions filed their Jurisdictional Statement with this Court on July 1, 1982. This Court noted probable jurisdiction on October 12, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2); §2101(c); §2104.

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

FIFTH AMENDMENT:

No person shall be...deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT: (DUE PROCESS and EQUAL PROTECTION) §1:

.....No state shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPLICABLE STATUTES

The most germane statutory provisions applicable to this appeal and contained in the Indiana Tax Sale Statutes are cited below in pertinent part:

IND. CODE §6-1.1-24-3

> (a) When real property is eligible for sale under this chapter, the county auditor shall post a copy of the notice required by Section 5 of this chapter at a public place of posting in the county courthouse at least three (3) weeks before the

date of sale. In addition, the county auditor shall publish the notice required in Section 2 of this chapter, including the statement required in Section 2.1 of this chapter, in the manner prescribed in I.C. §6-1.1-22-4(b) once each week for three (3) consecutive weeks before the sale....

IND. CODE §6-1.1-24-4

(a) In addition to the notice required by Section 3 of this chapter, the county auditor shall send a notice of the sale by certified mail to the owner or owners of the real property at their last address. The county auditor shall prepare the notice in the form prescribed by the State Board of Accounts, and he shall mail the notice at least twenty-one (21) days before the day of sale....

IND. CODE §6-1.1-25-6

(a) The county auditor shall send a notice by certified mail to the former owner of real property not more than sixty (60) days nor less than thirty (30) days before a tax deed for the property is executed and delivered under this chapter. The county auditor shall prepare the notice on the form prescribed by the State Board of Accounts....

IND. CODE §6-1.1-25-4(d)

(d) A tax deed executed under this section vests in the grantee an estate in fee simple absolute, free and clear of all liens and encumbrances except for the lien of the state for taxes and special assignments which accrue subsequent to the sale and which are not removed under subsection (c) of this section....

STATEMENT OF THE CASE

This case presents the question of whether the Indiana tax sale statutes[1] in effect at the time this case arose are in

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[1]Ind. Code §§6-1.1-24-1 et. seq. and Ind. Code §§6-1.1-25-1 et. seq. Effective January 1, 1981, the statutory manner of giving notice to mortgagees was amended by Acts 1980, P.L. 45, p. 544. The 1980 amendment was not considered by the Indiana courts in deciding this case against the Mennonite Board of Missions. Consequently, it does not present an issue to be decided by this Court.

The 1980 amendment, Ind. Code §6-1.1-24-4.2 reads as follows:

> (a) In addition to the notice required by sections 3 and 4 of this chapter, the county auditor shall send a notice of sale to any mortgagee of real property which is subject to sale under the provisions of this chapter, if the mortgagee, annually, on a form prescribed by the state board of accounts, has:
>
> (1) requested that notice of a sale of the real property be sent to him; and
>
> (2) agreed to pay a fee to the county auditor, to cover the cost of sending notice.

violation of Due Process and Equal Protection under the Constitution of the United States.

This case originated when the Appellee, Richard C. Adams, hereinafter referred to as Adams, filed a complaint seeking to quiet title to some property commonly known as 1829 Stevens Avenue, Elkhart, Indiana (J.A. p. 3). In his complaint, Adams named as party Defendants, Alfred Jean M. Moore, hereinafter

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(Footnote continued from preceding page) The county council shall set the annual fee referred to in clause (2) of this section. However the fee may not exceed ten dollars ($10), for each separate parcel as carried on the tax records.

(b) The county auditor shall send the notice of sale to the mortgagee's last known address by certified mail. The county auditor shall prepare the notice in the form prescribed by the state board of accounts, and he shall mail the notice at least twenty-one (21) days before the date of sale. As added by Acts 1980, P.L.45, SEC.1.

referred to as Moore,[2] and the Mennonite Board of Missions, the Appellant herein.[3] Adams requested that the Elkhart County Sheriff deliver a copy of the summons and complaint to the Mennonite Board of Missions. A deputy sheriff hand delivered the complaint to the Mennonite Board of Missions at their principal offices located at 500 South Main Street, Elkhart, Indiana. (J.A. pp. 9-11).

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[2]The record of this case shows that Moore was not present when the Elkhart County Sheriff went to 1829 Stevens to deliver the summons and complaint. A deputy left a copy of the complaint there and also mailed a copy to Moore at her last known mailing address: 1829 Stevens Avenue. Moore never responded to the complaint. A default judgment was entered against her on December 5, 1979. (J.A. p. 20). She is not a party to this appeal.

[3]The Mennonite Board of Missions is an administrative branch of the Mennonite Church. It is a not-for-profit, charitable, eleemosynary, religious organization, with offices located for over fifty (50) years in Elkhart County, Indiana.

Adams alleged in his quiet title action that he now owned the Stevens property in fee simple under Indiana law free and clear of any interest asserted by Moore and the Mennonite Board of Missions. (J.A. p.6).

Prior to the tax sale Moore owned the fee simple title to the property in question. (J.A. p.5). She had purchased the Stevens property from the Mennonite Board of Missions and on February 7, 1973, Moore executed a mortgage in favor of the Mennonite Board of Missions on the Stevens property.[4] (J.A. pp.5, 67-70). Under the terms of the mortgage agreement, Moore was responsible for paying all of the property taxes. (J.A. p.68-69). However, unknown to the Mennonite Board of Mission

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[4]On March 1, 1973, the mortgage was recorded in the Elkhart County Recorder's Office, and can be found at Mortgage Record 388, Page 693.

she failed to pay the property taxes, and as a consequence, the Stevens property was sold by the Elkhart County Auditor to the Appellee, Adams, at a tax sale on August 8, 1977. (J.A. 3).

The Indiana procedures for selling real property for delinquent taxes provide that each county auditor shall prepare and record on or before June 1st of each year a list of real property on which one or more installments of property taxes have been delinquent for fifteen (15) months or more, or upon which a special assessment payment is due.[5]

Property upon which taxes are delinquent will be sold by the county treasurer on the second Monday of August, at public action to the highest bidder.[6]

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[5]Ind. Code §6-1.1-24-1

[6]Ind. Code §§6-1.1-24-1 and 6-1.1-24-5(e)

Indiana law requires that the county auditor send personal notice to owners by way of certified mail twenty-one (21) days prior to a tax sale.[7] The Mennonite Board of Missions does not challenge the way in which notice to owners is given under Indiana law. Nor does the Mennonite Board of Missions contend that the statutory manner of providing notice to Moore was not followed in this case.[8]

Unlike the notice provision utilized for owners, Indiana law, in effect at the time this case began did not require the county auditor to send personal notice to mortgagees prior to a tax sale. It provided for only constructive notice to

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[7] Ind. Code §6-1.1-24-4

[8] The public records of the Elkhart County Auditor's Office show that notice by certified mail was sent to Moore prior to this tax sale in August, 1977, and prior to the expiration of the redemption period in August of 1979; however, Moore never picked up either of those certified mailings.

mortgagees by posting at the courthouse and by publication in the newspaper.[9] Because of this statutory manner of notice to mortgagees, the Mennonite Board of Missions was unaware of the August 8, 1977 tax sale. (J.A. p. 25). Despite that tax sale, Moore continued to pay the mortgage to the Mennonite Board of Missions each month. (J.A. 25).

Indiana law allows an interested person a two (2) year period from the date of a tax sale to pay the tax delinquency and retain his property interest, if the property was sold to a private citizen, like Adams. But it does not contain any provisions to notify a mortgagee of the expiration of this redemption period.[10]

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[9] Ind. Code §6-1.1-24-3.

[10] Ind. Code §6-1.1-25-1. This redemption period is reduced to 90 days if purchased by someone acting under a state qualified urban homesteading program or one year if purchased by the county.

Under Indiana law if an interested person fails to pay the delinquent taxes prior to the expiration of the redemption period, the tax sale purchaser receives a tax deed from the state giving him a fee simple title free and clear of all prior recorded liens and encumbrances except those of the state.[11]

The Mennonite Board of Missions first learned that the Stevens property had been sold for taxes after the redemption period expired, when Moore informed them that she was in trouble. (J.A. 25). In his quiet title action, Adams sought to have the prior recorded mortgage of the Mennonite Board of Missions declared null and void, and to enjoin them from asserting any claim against the title to the Stevens property. (J.A. pp. 4-7).

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[11] Ind. Code §6-1.1-25-4.

The Mennonite Board of Missions challenged the constitutionality of the Indiana tax sale statutes in their answer and affirmative defense. (J.A. p.11, 14, 15). Subsequently, the Appellee filed a motion for summary judgment against the Mennonite Board of Missions. (J.A. p.22). Adams claimed that there were no genuine issues of material fact in dispute and that he was entitled to a judgment in his favor as a matter of law, relying upon an Indiana case, First Federal Savings and Loan Association of Central Indiana v. Furnish[12]

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[12] Ind. App.__, 367 N.E.2d 596 (1977) In that case, the mortgagor defaulted in its principal payments to the mortgagee, First Federal Savings & Loan Association of Central Indiana (First Federal), and also became delinquent in its payment of taxes. As a consequence, the property was sold by the State at a public sale. Notice to First Savings was only by posting and publication. First Savings had no actual notice of this sale. The property in question was purchased by Furnish at the tax sale. Before the expiration of the redemption period First Savings foreclosed on the property, and named Furnish as a defendant. First Savings, however,

which held that the Indiana tax sale statutes, then in effect, did not violate Due Process. In response, the Appellant filed a cross motion for summary judgment, agreeing that there were no disputed questions of fact, but taking the legal position that the Indiana tax sale statutes were unconstitutional because they only provide for notice by posting and publication to a mortgagee of record, prior to a tax sale which is insufficient notice, as established by this Court in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (J.A. pp. 27, 37).

(Footnote continued from preceding page) never exercised its statutory right to redeem the property prior to the expiration of the redemption period. The trial court held that Furnish owned the property in fee simple under Indiana law, and on appeal the Indiana Court of Appeals rejected First Savings' Due Process assertion that the tax sale was invalid because insufficient notice was given it of the tax sale. This case is set out in full in the Jur. St. App. pp. 29-43.

As previously noted, Indiana law gives a mortgagee the statutory right to redeem his interest by paying the tax delinquency prior to the expiration of the redemption period. Exercising that right, the Mennonite Board of Missions tendered the statutory amount[13] to redeem the property had they received actual notice of the tax sale. (J.A. pp. 50-52).

The trial court followed the Furnish decision and granted judgment in favor of the Appellee, thereby extinguishing the property interest of the Mennonite Board of Missions. (J.A. p. 54).

Subsequent to the decision by the trial court and during the pendency of this appeal, the Indiana General Assembly amended the Indiana tax sale statutes to provide for additional notice to mortgagees. That statute, Ind. Code

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[13] Ind. Code §6-1.1-25-2.

§6-1.1-24-4.2, as added by the 1980 Second Regular Session of the 101st Indiana General Assembly, Acts 1980 P.L. 45, p. 544 took effect on January 1, 1981.

The Indiana Court of Appeals did not consider the effect, of the 1980 Amendment to this controversy.[14] Therefore, this Court likewise need not consider the direct impact, of the 1980 Amendment in deciding the questions presented herein by the Mennonite Board of Missions.

Appellant argued before the Indiana Court of Appeals that the Indiana tax sale statutes then in effect violated Due Process as set forth by this Court in Mullane v. Central Hanover Bank & Trust Company 339 U.S. 306 because the only notice to mortgagees is by posting at the courthouse and publication in a newspaper, and because no notice at all is given to

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[14] Jur. St. App. p. 27 fn[9]

mortgagees before a tax deed is issued which results in the state taking the Mennonite Board of Missions' property without any compensation.

And the Mennonite Board of Missions further argued that those statutes violated Equal Protection because they provide for mailing notice to "Owners" of the real property both before a tax sale is held, and prior to a tax purchaser being issued a tax deed while no similar provision exists to mail notice to mortgagees in either situation.

On October 29, 1981 the Indiana Court of Appeals affirmed the decision of the trial court, rejecting Appellant's DUE PROCESS and EQUAL PROTECTION claims. The Indiana Court of Appeals concluded that Mullane was inapplicable to this case.

SUMMARY OF ARGUMENTS

NOTICE OF A TAX SALE BY POSTING AND PUBLICATION VIOLATES DUE PROCESS

The Indiana tax sale statutes in effect at the time this case arose violate Due Process because they do not provide for adequate notice reasonably calculated to inform mortgagees of record that a tax sale is about to take place. The Indiana procedures only provide for constructive notice to mortgagees by posting at the courthouse and publication in a newspaper. This Court has recognized that such notice, is generally an unreliable means of informing interested parties that a proceeding, which may affect their interests, is at hand. Walker v. City of Hutchinson, 352 U.S. 112 (1956); Schroeder v. City of New York, 371 U.S. 208 (1962). Posting and publication may be appropriate notice when the names and the whereabouts of interested parties are not

known, despite a diligent search, but when, as here, the Mennonite Board of Missions' mortgage was a matter of public record, giving the Mennonite Board of Missions notice of a tax sale only by posting and publication violates DUE PROCESS. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)

THE INDIANA COURT OF APPEALS ERRED IN NOT FOLLOWING THE CONTROLLING PRECEDENT OF THIS COURT

The Indiana Courts erroneously chose not to apply the reasoning of this Court in Mullane. In Mullane, this Court addressed the issue of whether notice by publication to beneficiaries of a common trust fund was adequate under DUE PROCESS.

The Mullane Court held that with respect to beneficiaries whose names and addresses were known to the trustee notice by publication was inadequate. Under those circumstances, Due Process required

at a minimum notice by mail since that manner of service was more likely to result in the beneficiaries receiving actual notice.

The mortgagee interest of the Mennonite Board of Missions is entitled to no less Due Process protection than were the property interests of the known beneficiaries in Mullane. It thus follows that in this case, as a matter of Due Process, the Elkhart County auditor had to mail notice to the Mennonite Board of Missions, of a tax sale.

This Court has subsequently applied the Mullane guidelines to strike down other state statutes which also had only provided for constructive notice to interested parties by either posting and publication or both. In Schroeder v. City of New York, 371 U.S. 208 (1962), the City of New York sought to divert some water from the Neversink River which resulted in the

taking of a portion of the appellant owner's land. Pursuant to the New York City Water Supply Act, the city had published notice of its acquisition of the right to divert water in several newspapers, and in addition posted notice on trees and poles in the general vicinity where the water was to be diverted, although no notices were posted on the owner's land. This Court therein held that newspaper publications and posted notices did not measure up to the quality of notice required under Due Process, since the name and address of the riparian owner was easily ascertainable from public records. Id. 211-213. In Walker v. City of Hutchinson, 352 U.S. 112 (1962), the City of Hutchinson decided to condemn a portion of Walker's property in order to widen a city street. The city only sent notice of the condemnation to Walker by publication. This Court, noting that it

is common knowledge that newspaper publications rarely inform an owner of proceedings against his property, set aside the condemnation proceedings as a violation of Due Process. Id. 116-117. In Walker, the owner's name and address was known to the city. This Court indicated under those circumstances Due Process required that the owner be notified by mail.

More recently in Greene v. Lindsey, __U.S.__, 102 S.Ct. 1874 (1982), this Court applying Mullane invalidated the Kentucky Forcible Entry & Detainer Act. Greene raised the issue of whether posting notice of an eviction action on a tenant's door was sufficient under Due Process. Posting was done only after personal service could not be obtained. This Court held that such substitute service was inadequate, and concluded that additional service by mail was an expeditious, inexpensive, required alternate manner of

service which would be more likely to apprise the tenant of the eviction action.

The decision by the Indiana Court of Appeals in this case cannot be affirmed by this Court without substantially cutting back on the principles established by this Court in Mullane, Schroeder, Walker, and Greene.

THE PROCEDURES CHOSEN BY INDIANA TO NOTIFY MORTGAGEES OF A TAX SALE CANNOT BE JUSTIFIED

Applying the criterion established by this Court in Mathews v. Eldridge, 424 U.S. 319 (1976), it is apparent that Due Process requires that Indiana send notice to all interested parties by mail. In Mathews, this Court clarified the analysis relative to when a particular statute measures up to minimum standards of Due Process.

In this case the private interest which is affected by state action is the permanent loss of the Mennonite Board of Missions' mortgage without ever having received actual notice of a tax sale. This taking without notice or compensation is unconstitutional. Cf. Loretto v. Teleprompter Manhattan CATV Corp., __U.S.__, 102 S.Ct. 3164 (1982).

A recent Indiana case, St. Joseph County v. Wilmes, Ind. App., 428 N.E.2d 103 (1981), demonstrates how mailing notice to mortgagees actually safeguards against the State erroneously selling property for delinquent taxes. In the St. Joseph County case, the owner had paid the real estate taxes, but the auditor erroneously sold the property at a tax sale anyway. After the sale, the auditor, although not required by Indiana law, sent notice of the tax sale to the mortgagee. The mortgagee promptly paid the taxes, and

proceeded to investigate why they were not paid earlier, and in the course of the investigation learned that the auditor had made a mistake.

The only interests of the State in selling property for delinquent taxes is simply to collect the delinquency. The interests of the State in not providing for better notice to a mortgagee of a tax sale are nonexistent. Indeed, the interests of the State to collect delinquent taxes are better served by mailing notice to mortgagees. St. Joseph County v. Wilmes, supra.

The fiscal and administrative impact on the State to send substitute notice by mail is slight. Notice by mail would be a less expensive, faster, and better procedure, one more reasonably calculated to apprise a mortgagee of a tax sale than is the method of notice by posting and publication.

In this case the lack of notice in the Indiana Statutes resulted in the Mennonite Board of Missions being permanently deprived of their property interest without ever having received adequate notice prior to the State action and even more without any compensation. The sending of a letter to the Mennonite Board of Missions, informing them of the tax sale, could have avoided the unconstitutional taking of the Mennonite Board of Missions' property interest. Had the Mennonite Board of Missions received adequate notice they would have paid the delinquent taxes and retained their property interests. In fact, shortly after first learning of the tax sale, the Mennonite Board of Missions tendered the statutory amount to pay the tax delinquency and redeem their mortgage. The State would thus have avoided the administrative time and expense of a tax sale.

In weighing the private interest at stake with the recognized State power to collect delinquent taxes, the procedures chosen by Indiana cannot be justified in view of the significant risk that an erroneous permanent deprivation of property may result when substitute notice by mail would appreciably eliminate this loss with little or no fiscal or administrative burden on the State. In fact, the State's interest would be better served by mailing notice. Mailed notice to mortgagees could result in avoiding an erroneous sale. It could also result in the State being paid sooner, and would in many cases result in the State saving administrative time and expenses by avoiding a tax sale.

IT IS A VIOLATION OF EQUAL PROTECTION TO GIVE ADEQUATE NOTICE ONLY TO ONE CLASS OF INTERESTED PARTIES

In the Due Process arguments it was demonstrated that notice of a tax sale to

mortgagees only by posting and publication was a violation of Due Process. It would also be a violation of Due Process if Indiana had chosen to give notice to owners only by posting and publication. Dow v. State, 396 Mich. 192, 240 N.W.2d 450 (1976) (Owner of significant interest in property must be given notice by mail of a tax sale. Notice by publication is insufficient). Accord, Township of Montville v. Block 69, Lot 10, 74 N.J.1, 376, A.2d 909 (1977). Indiana recognized as much, and thus provided for notice to owners by mail. But in providing adequate notice to owners, Indiana did not cure the constitutional defect in the manner of the notice provided to mortgagees. Each is entitled to adequate notice of a tax sale.

Even from the standpoint of the State's interest involved, it makes no sense and does not further any interest of the State

of Indiana to provide for notice to mortgagees only by posting and publication. There is no rational basis or State interest in distinguishing between owners and mortgagees with respect to the type of notice given to either of a tax sale when inadequate notice to either is a violation of Due Process. Cf. Zobel v. Williams, __U.S.__, 102 S.Ct. 2309 (1982). The distinction between the manner of service between the two supports no significant State interest. The Indiana Legislature has apparently recognized this when they amended the tax sale statutes in 1980 to provide for mailing notice to mortgagees.

County Auditor's in Indiana have not uniformly applied the Indiana tax sale statutes. In neighboring St. Joseph County, the County Auditor mails notices to mortgagees, probably because the St. Joseph County Auditor recognized the fundamental unfairness of only providing

constructive notice, and how simple a matter it was to mail notice to mortgagees of record. St. Joseph County v. Wilmes, Ind. App., 428 N.E.2d 103 (1981). However, because Indiana officials do not treat all mortgagees equally, the Indiana tax sale statutes, as applied to the Mennonite Board of Missions are unconstitutional. Cf. Yick Wo v. Hopkin, 118 U.S. 356 (1885)

ARGUMENTS

THE INDIANA PROCEDURE VIOLATES DUE PROCESS BECAUSE THE MENNONITE BOARD OF MISSIONS WAS NOT GIVEN ADEQUATE NOTICE BEFORE BEING PERMANENTLY DEPRIVED OF THEIR PROPERTY BY STATE ACTION

In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), this Court reaffirmed some general principles of due process which stand out in the books. One "...[f]undamental requisite of due process of law is the opportunity to be heard." Id. p. 314; Grannis v. Ordean, 234 U.S.

385, 394. Another cardinal rule of Due Process noted by this Court in Mullane is that

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Id. p. 314.

Milliken v. Meyer, 311 U.S. 457; Grannis v. Ordean, 234 U.S. 385, 394.

In this case the Mennonite Board of Missions was denied Due Process because they were never given adequate notice of the tax sale. As a result, the Mennonite Board of Missions never knew that the Stevens property was sold by the Elkhart County Auditor to Adams until after the statutory redemption period expired. By that time, Adams had already been granted a tax deed by the Elkhart County Auditor, and pursuant to Indiana law Adams now owned the Stevens property in fee simple,

free and clear of the Mennonite Board of Missions' prior recorded mortgage.

This Court has emphasized on many occasions that the fundamental right to notice and an opportunity to be heard must be granted at "a meaningful time and in a meaningful manner" Fuentes v. Shevin, 407 U.S. 67, 80 (1972).

> "The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment--to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party." (emphasis added) Ibid, 80.

Because they never received notice, the Mennonite Board of Missions never had an opportunity to be heard before the sale. Meanwhile, despite the sale, Moore

continued to pay the Mennonite Board of Missions the amount due under the mortgage each month. Thus, having received no actual notice of the tax sale, and with Moore continuing to pay her mortgage, the Mennonite Board of Missions had no reason to suspect that the Stevens property had just been sold by the State for delinquent taxes.

After a tax sale, the Mennonite Board of Missions, had the statutory right to redeem their property interest by paying the amount of the delinquent tax, together with interest, but Indiana law did not contain any requirement to notify the Mennonite Board of Missions of the tax sale and their subsequent right to redeem.

Since no notice was sent to the Mennonite Board of Missions following the tax sale and prior to the expiration of the

redemption period, the effect of the Indiana statutes is that the Mennonite Board of Missions had no actual knowledge of the tax sale until it was too late to redeem their property interest. After the redemption period expired, Indiana law vested Adams with a fee simple title to the Stevens property, free and clear of prior recorded liens. Consequently, the Mennonite Board of Missions never even had an opportunity under Indiana law to be heard before the state permanently deprived them of their significant property interest. Had the Mennonite Board of Missions received adequate notice, such as a simple letter or even a phone call, they would have paid the taxes as demonstrated by the fact that after actually learning of the tax sale, they promptly paid the statutory amount necessary to redeem the Stevens property.

Indiana law as applied to the Mennonite Board of Missions amounts to the State taking property without adequate notice and with no compensation. It is fundamentally unfair and a clear violation of the Constitution for the Mennonite Board of Missions to be deprived of property in such a manner. Cf. Lorretto v. Teleprompter Manhattan CATV Corp., __U.S.__, 102 S.Ct. 3164 (1982); Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).

IN BALANCING THE INTERESTS OF THE STATE WITH THE INTERESTS OF THE MENNONITE BOARD OF MISSIONS, THE PROCEDURES CHOSEN BY INDIANA TO SELL PROPERTY FOR DELINQUENT TAXES CANNOT BE UPHELD

In Mathews v. Eldridge, 424 U.S. 319 (1976), this Court reviewing prior decisions formulated the test to be applied to determine whether certain procedures measure up to Due Process.

> "More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Ibid p. 335.

Using the Mathews approach, it is readily apparent that the Indiana tax sales statutes in effect at the time this case arose fail to withstand constitutional scrutiny.

THE PRIVATE INTEREST AFFECTED BY STATE ACTION IS THE PERMANENT LOSS OF PROPERTY

The nature of the private interest at stake is the Mennonite Board of Mission's permanent loss of their mortgage. A mortgagee is assuredly an interested party if the real property upon which he has a

mortgage is scheduled to be sold by the state because of delinquent property taxes. A mortgagee certainly has a significant property interest which could be affected by a tax sale. Although the precise nature of the mortgagee's interest depends upon state law, which may vary from state to state, under Indiana law a mortgagee's interest is subject to constitutional protection. Once a mortgagee's interest is recorded,[15] subsequent purchasers are charged with notice of the lien. In order to discharge the recorded mortgage from his title, a subsequent purchaser must deal directly with the mortgagee of record. A prospective buyer cannot discharge a mortgage by simply buying the property from the mortgagor. Unless paid, the mortgage remains a lien attached to the property.

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[15] Ind. Code §32-1-2-16

Indiana recognized that a mortgage is a valuable interest in real property, and accordingly granted a mortgagee the statutory right[16] to redeem his interest by paying the tax delinquency.

THE STATE INTEREST IN SELLING PROPERTY FOR DELINQUENT TAXES IS SOLELY TO COLLECT THE DELINQUENT TAX

The State of Indiana has an important interest at stake in selling real property for delinquent taxes. In Indiana, as in most other states, one prime source of revenue to keep state and county governments operating is property taxes.[17] If persons fail to pay their property taxes, the effect on government could be calamitous. Revenues would be reduced, and

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[16]Ind. Code §6-1.1-25-1

[17]Note, The Constitutionality of Notice by Publication in Tax Sale Proceedings 84 Yale Law Journal 1505 (reviews state law in all 50 states and District of Columbia relative to tax sales)

vital government services could be impaired. Accordingly, Indiana promulgated the Indiana tax sale statutes to provide a means to collect delinquent property taxes.[18] A state however may not choose any method to collect delinquent property taxes. The statutes adopted must be within the bounds of Due Process under the Fourteenth Amendment to the United States Constitution.

A state's power to collect taxes is not unbridled. In Marchetti v. United States, 390 U.S. 39, this Court recognized the power of government to tax, but also noted that the Constitution places limitations in connection with the exercise of those powers. Id. 58. Indeed, it is this concern about abuses of tax power which led to the adoption of the Due Process

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[18]The Court of Appeals in this case referred to the collection of delinquent taxes as the obvious purpose of the statute (Jur. St. App. 26).

Clause contained in the Fifth and Fourteenth Amendment. Compare: Fuentes v. Shevin, 407 U.S. 67 (1972); Frank v. Maryland, 359 U.S. 360, 378 and G.M. Leasing Corp. v. U.S., 429 U.S. 338.

THE PROCEDURES CHOSEN BY INDIANA TO NOTIFY MORTGAGEES OF A TAX SALE CREATE A SUBSTANTIAL RISK OF AN ERRONEOUS DEPRIVATION OF PROPERTY WHILE SUBSTITUTE SERVICE BY MAIL WOULD REDUCE THE LIKELIHOOD OF ERROR

Indiana's choice to send constructive notice to mortgagees by posting and publication was not reasonably calculated to inform the Mennonite Board of Missions of a tax sale under the circumstances. Because of this manner of service the Mennonite Board of Missions never received actual notice of the sale to Adams in this case. And this problem is likely to recur. In other states where only constructive notice was given to interested parties, the result was the same; the

interested parties did not receive actual notice of the tax sale.[19]

IT WOULD NOT HAVE BEEN DIFFICULT FOR THE ELKHART COUNTY AUDITOR TO HAVE ASCERTAINED THE NAME AND ADDRESS OF THE MENNONITE BOARD OF MISSIONS

In this case the Elkhart County Auditor sent notice to Moore by certified mail regarding the tax delinquency, although Moore never picked up the notice. The process for mailing notice to the Mennonite Board of Missions would be the same as it was for Moore. The Mennonite Board of Missions' mortgage was a matter of public record. Under Indiana law,

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[19] Laz v. Southwestern Land Company (1964), 97 Ariz. 69, 397 P. 2d 52; Quay Development, Inc. v. Elegante Building Corporation (1981), Fla., 392 S. 2d 901; Chapin v. Aylward (1970), 204 Kan. 448, 464 P. 2d 177; Dow v. State (1976), 396 Mich., 192, 240 N.W. 2d 450; Collector of Revenue of the City of St. Louis v. Parcels of Land Encumbered with Delinquent Tax Liens (1979), Mo., 585 S.W. 2d 486; Township of Montville v. Block 69, Lot 10 (1977), 74 N.J. 1, 376 A. 2d 909.

before a deed or mortgage can be recorded, and be made a matter of public record, it must be first submitted to the county auditor so that it can be duly entered of record for taxation.[20] It would not have been difficult for the Elkhart County Auditor to have checked the Elkhart County public records to ascertain that the Mennonite Board of Missions had a mortgage on the Stevens property. It would have then been a relatively simple matter to mail notice to the Mennonite Board of Missions concerning Moore's tax delinquency. The fact that the Mennonite Board of Missions is a charitable, religious organization, affiliated with the Mennonite Church with offices located in Elkhart, Indiana is well known in Elkhart County.

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[20] Ind. Code §17-3-39-8 (recodified as Ind. Code §§36-2-9-18 and 36-2-11-14, effective September 1, 1981). Note also Ind. Code §32-8-20-1 requires the name and address of the mortgagee be on the recorded mortgage.

Indeed, the fact that Adams had checked the public records of Elkhart County and then directed the Elkhart County Sheriff to give the Mennonite Board of Missions notice of this lawsuit further reveals that the Elkhart County Auditor could also have simply checked the public records and then mailed notice to the Mennonite Board of Missions about the tax sale. Surely, the Elkhart County Auditor could also have checked the public records and mailed a letter to the Mennonite Board of Missions too.

NOTICE BY MAIL TO MORTGAGEES OF RECORD IS AN INEXPENSIVE PROCEDURAL SAFEGUARD WHICH WOULD SUBSTANTIALLY REDUCE THE LIKELIHOOD OF AN ERRONEOUS SALE OF PROPERTY

Notice reasonably calculated to apprise mortgagees would more likely than not reduce the prospects that the State might mistakenly sell property for delinquent taxes. The interests of mortgagees

and the State are identical with respect to the payment of property taxes. Each has a keen concern that the mortgagor not allow the taxes to become delinquent. In all actuality, the interests of the State are better served in mailing notice to a mortgagee in regard to a tax delinquency and possible sale. If a mortgagee received adequate notice he would undoubtedly, at no expense to the State, contact the mortgagor and investigate, on behalf of the State why there is a tax delinquency, if any. In the event a delinquency does exists, in all probability, the mortgagee would pay it immediately. This would result in substantial savings to the State in avoiding additional time and expenses which are incidental to any tax sale.

AN INDIANA CASE DEMONSTRATES THAT MAILING NOTICES TO MORTGAGEES CAN PREVENT AN ERRONEOUS DEPRIVATION OF PROPERTY

In the next county from the Mennonite Board of Missions' Elkhart, Indiana office, the St. Joseph County Auditor mails notices to mortgagees. Mailing notice to a mortgagee after a tax sale in one recent case, prevented an erroneous deprivation of property. In St. Joseph County v. Wilmes, Ind. App., 428 N.E.2d 103 (1981), the St. Joseph County Auditor mistakenly sold some property at a tax sale. Although the taxes had been paid, the payment was not entered on a computer. After the tax sale the auditor mailed notice to the mortgagee. Upon learning of the sale, the mortgagee promptly paid the purported delinquent taxes, and investigated the problem, following which the error was discovered. The auditor then

refunded the mortgagee's second tax payment.

Similarly, had the Elkhart County Auditor mailed notice to the Mennonite Board of Missions, they would have paid the taxes, and the tax sale could have been avoided.

THE INDIANA COURT OF APPEALS ERRED IN NOT FOLLOWING MULLANE AND OTHER PRECEDENT OF THIS COURT

The Indiana Court of Appeals failed to follow this Court's decision in Mullane. Instead, the Indiana Court of Appeals followed existing Indiana precedent in First Federal Savings & Loan of Central Indiana v. Furnish, Ind. App., 367 N.E.2d 596 (1977). In Furnish, the Indiana Court of Appeals had erroneously concluded that a mortgagee of record was not entitled to the protections afforded by Due Process because only "owners" of the legal title

are covered, and thus, determined that Mullane would not apply.

This Court has not limited Due Process to just "owners" of a legal title, but has applied Due Process protection to persons having any significant property interest which may be affected by state action.

In Fuentes v. Shevin, 407 U.S. 67 (1972), this Court reviewed statutes from Florida and Pennsylvania which had authorized the summary seizure of goods or chattels. The statutes in each of those states provided for an ex parte application by a person claiming an interest in the property. If a person claiming an ownership interest in personal property posted a bond, the Court would issue a writ of replevin for the disputed chattels. In each case, a three judge federal district panel held that the seized goods --a stove, a stereo, a table, and the like--were not subject to Due Process

protection, since they were not absolute necessities of life. Rejecting that view, this Court reversed noting that Due Process embraces a larger class than simply "owners."

> "Any significant taking of property by the State is within the purview of the Due Process Clause. While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of the basic right to a prior hearing of some kind.
>
> "The appellants who signed conditional sales contracts lacked full legal title to the replevied goods. The Fourteenth Amendment's protection of "property," however, has never been interpreted to safeguard only the rights of undisputed ownership. Rather, it has been read broadly to extend protection to 'any significant property interest.'" Id. p. 86.

In Fuentes this Court concluded that Due Process required notice and an opportunity to be heard before the State may take personal property from its possessor. In this case, a mortgage is entitled to at least as much protection as a stove,

stereo, or table. And here, the deprivation is permanent, unlike, in Fuentes where the deprivation in theory, at least, may have been only temporary. Accordingly, based on Fuentes, this Court should find the Indiana tax sale statutes unconstitutional.

The Indiana Court of Appeals erroneously held that Indiana law did not violate Due Process although no provision exists to give notice to mortgagees following a tax sale. In support of that rule of law, the Court of Appeals relied upon Short v. Texaco, Ind. 406 N.E.2d 625 (1980), affirmed Texaco v. Short, 454 U.S. __, 102 S.Ct. 781 (1982).

Texaco is not applicable to this case. In Texaco, the failure to use a mineral interest for twenty years resulted in its reversion to the surface owner. This Court noted that the Indiana act in question did not require the State to take any

affirmative action.

> "It is the owner's failure to make any use of the property--and not the action of the State--that causes the lapse of the property right." Id. 102 S.Ct. 792.

In this case, the Indiana tax sale statutes required a series of affirmative acts by the Elkhart County Auditor to trigger them, and most importantly, the Mennonite Board of Missions did not abandon their property interest, but were enjoying the use and benefit of it, until the state acted without notice to take it away. Unlike in Texaco, an interested party cannot be presumed to know that his property is being sold by the State unless he receives notice reasonably calculated to apprise him of that fact.

In Mullane, this Court invalidated a New York statute which authorized notice by publication to beneficiaries of a common trust informing them about an annual judicial settlement of the common trust

account. This Court held that with respect to known beneficiaries Due Process required notice by mail, which this Court concluded was more reasonably calculated to give actual notice than notice by publication. This Court in Mullane stated the general rule that:

> "Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability, notice must be such as is reasonably calculated to reach interested parties. Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." Ibid 318.

When, as here, the name and address of the Mennonite Board of Missions could have been easily obtained by the Elkhart County Auditor, the reasons disappear for means less likely than the mail to notify the Mennonite Board of Missions of a tax sale.

Based upon this Court's reasoning in Mullane, the Indiana Court of Appeal's decision in this case must be reversed.

The magnitude of the constitutional infirmity in this case is greater than in Mullane. In this case, lack of notice results in the Mennonite Board of Missions being permanently deprived of the property interest while in Mullane the question concerned only a review of how the trustee managed the common trust fund assets--not necessarily the permanent loss of the principal.

This Court has subsequently applied the Mullane guidelines to strike down various statutes which only provide for constructive notice to interested parties. In Walker v. City of Hutchinson, 352 U.S. 112 (1956), this Court held that newspaper publication of a condemnation proceeding did not measure up to the notice requirements of Due Process where the name and address of the owner whose property was affected by the proceeding was known to the city. In Walker, the only form of

notice to the property owner was by publication in a newspaper. Addressing the issue of the validity of notice by publication, Justice Black wrote that:

> "Measured by the principles stated in the Mullane case, we think that the notice by publication here falls short of the requirements of due process. It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property. In Mullane we pointed out many of the infirmities of such notice and emphasized the advantage of some kind of personal notice to interested parties. In the present case there seem to be no compelling or even persuasive reasons why such direct notice cannot be given. Appellant's name was known to the city and was on the official records. Even a letter would have apprised him that his property was about to be taken and that he must appear if he wanted to be heard as to its value." Ibid p. 116.

What happened in the Mennonite Board of Missions case offends the fundamental concepts of Due Process even more so than in the Walker case, because in Walker, although the government took a property interest, it did pay compensation for it,

while here, the Mennonite Board of Missions property interest was taken by the government without any compensation at all.

In another case, similar to this appeal, this Court struck down a New York procedure which provided for giving notice to a riparian land owner only by publication and posting. Schroeder v. City of New York, 371 U.S. 208 (1962). Finding that Mullane controlled the disposition of that case, this Court lambasted the use of constructive notice to interested parties when their names and address are known. In the latter event, the state must as a matter of Due Process send notice by mail.

In New York v. New York, N.H. and H.R. Company, 304 U.S. 293 (1953), this Court reiterated the general rule that notice by publication is a poor and sometimes hopeless substitute for actual service of

notice, and that its justification is difficult at best. Based upon the same reasoning and analysis, in the above cited cases, this Court should find the Indiana tax sale statutes which only provides for notice to mortgagees by posting and publication unconstitutional.

In Covey v. Town of Somers, 351 U.S. 141, this Court struck down as a violation of Due Process under the Fourteenth Amendment the taking of property from a known incompetent by the State as a result of a tax sale, even though the New York statutory procedures for selling property because of delinquent taxes were followed.

It should be noted that Mennonites seldom become involved in litigation because of their religious beliefs. Thus, the likelihood of a Mennonite going to the courthouse to look at a public notice is not great. And as this Court has previously noted in Mullane:

> "Chance alone brings to the attention of...a...resident [a legal] advertisement in small type inserted in the back pages of a newspaper." Id 315.

It is submitted that the prospects of a Mennonite reading a legal notice is slim at best. Elkhart County has a higher ratio of Mennonite citizens than nearly any other place in the United States. It is further submitted that Elkhart County officials should thus know that the Mennonite Board of Missions, an affiliate of the Mennonite Church, would not be in the habit of reading legal notices posted at the courthouse or in newspapers. Yet, the Elkhart County Auditor's only notice to the Mennonite Board of Missions was by posting at the courthouse and publishing a legal notice in a newspaper. Under these circumstances, the sale of the Mennonite Board of Missions' property interests constitutes a violation of Due Process. Covey v. Town of Somers, 351 U.S. 141.

In a similar fashion, this Court applying the Mullane guidelines invalidated a State sale of an automobile because the State knew that the owner was in jail at the time of the forfeiture sale but instead sent him notice at his home mailing address. Robinson v. Hannahan, 409 U.S. 38 (1972).

This Court, just this last Term, in Greene v. Lindsey, __U.S.__, 102 S.Ct. 1874 (1982), reaffirmed those well entrenched Due Process principles articulated in Mullane. In Greene, this Court struck down the Kentucky Forcible Entry and Detainer Act holding that the posting of service of process by tacking it upon the door of a tenant's apartment was, under the circumstances, not reasonably calculated to apprise a tenant of an eviction action and hence was violative of Due Process. This Court citing Mullane suggested that service on a tenant by mail

was an inexpensive additional manner of service which would more likely result in the tenant receiving actual notice of the eviction proceedings.

The defective notice in the Indiana tax sale statutes is even more egregious than the deficiency this Court found in Greene. The Kentucky procedures in Greene initially provided for personal service on a tenant by directing the sheriff to give a tenant personal notice of an eviction action. The Kentucky procedure then provided for posting notice on a tenant's apartment door if he was not home. These notice provisions are more reasonably calculated to apprise a tenant of an eviction action than are the procedures chosen by Indiana to inform a mortgagee of a tax sale. To begin, there is no requirement under Indiana law to initially give personal notice to a mortgagee of a tax sale

by the sheriff unlike the Kentucky procedure in Greene. Secondly, posting on a tenant's door under the Kentucky procedure is more apt to come to the attention of an interested person than is the procedure utilized by Indiana where posting does not take place at the affected property but at the Courthouse. This decreases the likelihood of an interested person receiving actual notice of a tax sale. Thus, based upon this Court's holding in Greene, this Court should find the Indiana tax sale statutes unconstitutional because they fail to provide adequate notice to inform mortgagees of a tax sale or of their redemption rights.

THE PREVAILING VIEW IN OTHER STATES WHICH HAVE RULED ON THE SAME OR SIMILAR ISSUE RAISED HERE HAVE FOLLOWED MULLANE AND HELD THAT NOTICE BY PUBLICATION VIOLATES DUE PROCESS

Several state courts of last resort have already ruled upon the same or similar question(s) raised in this case. The prevailing weight of authority have followed the controlling precedent set by this Court in Mullane, and have held that constructive notice of a tax sale to interested parties violates Due Process. Those decisions concluded that the minimum requirement under Due Process is notice by mail.

In Laz v. Southwestern Land Co., 97 Ariz. 69, 397 P.2d 53 (1964), the owners had failed to pay a special assessment, and as a consequence, their property was sold at a regular assessment sale and a deed was given to the Southwestern Land Co. by the Superintendent of Streets of

the City of Tucson, Arizona. After the period to redeem the property expired, the Land Company brought a quiet title action against the owners of the legal title and Rose Laz, the mortgagee. The trial court granted a summary judgment in favor of the Land Co. The Arizona Supreme Court, citing Mullane and Schroeder, held that where the only notice to a mortgagee of record prior to a tax sale was by publication, the sale violated Due Process.

The Michigan Supreme Court in Dow v. State, 396 Mich. 192, 240 N.W.2d 450 (1976), citing Mullane and thoroughly canvassing other decisions of this Court held

> "that the Due Process Clause requires that an owner of a significant interest in property be given proper notice and an opportunity for a hearing at which he or she may contest the state's claim that it may take the property for nonpayment of taxes and that newspaper publication is not constitutionally adequate notice of such right." Id., 240 N.W.2d 450, 452.

The New Jersey Supreme Court in an exhaustive analysis of the decisons of this Court in Mullane and cases which followed concluded that:

> "under...federal constitutional guarantees, that where an owner's name and address appear..., notice must be sent by mail before a taxpayer's right to redeem his property may be foreclosed."

Township of Montville v. Block 69, Lot 10, 74 N.J.1, 376 A.2d, 909, 918 (1977)

Decisions in Florida, Kansas, and Missouri all followed Mullane, and have held that notice by publication is insufficient as a matter of Due Process in a tax sale.[21]

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[21] Quay Development, Inc. v. Elegante Building Corporation (1981), Fla., 392 S. 2d 901; Chapin v. Aylward (1970), 204 Kan. 448, 464 P. 2d 177; Collector of Revenue of the City of St. Louis v. Parcels of Land Encumbered with Delinquent Tax Liens (1979), Mo., 585 S.W. 2d 486

THE INDIANA TAX SALE PROCEDURES VIOLATE EQUAL PROTECTION

From the previous analysis, it is apparent that all persons with a significant interest in real property are entitled to notice by mail of a tax sale as a matter of Due Process. In this case, Due Process and Equal Protection overlap with respect to what procedures Indiana may constitutionally use in selling real property for delinquent taxes. It has been demonstrated from the previous discussion that the State of Indiana has no significant interest to be served by not mailing notice to mortgagees of record. Instead, the interests of the state are actually better served by mailing notice to mortgagees of record. Since the only purpose of the state in a tax sale is to collect delinquent taxes, no justification exists with respect to the discrimination in

notifying owners and mortgagees of a tax sale when the State's interest is enhanced by mailing notice to mortgagees as well as owners. And, where the failure to receive adequate notice is a violation of Due Process, no significant state interest can be advanced to support the difference in notice between the two. Cf. Zobel v. Williams, __U.S.__, 102 S.Ct. 2309 (1982).

This Court stated in Fuentes v. Shevin, 407 U.S. 67 (1972), that Due Process applies to more than "owners" of the affected property. In this case Due Process applies to mortgagees of record too. Therefore, it is a denial of Equal Protection not to send notice to mortgagees by mail. The discrimination in the manner of notice between owners and mortgagees has no rational basis, and furthers no compelling State interest. The Indiana legislature recognized this fact and as a consequence amended the tax sale statutes

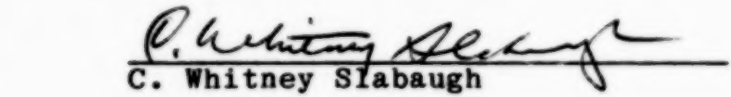
in 1980 after the decision in Furnish to provide for additional notice to mortgagees by mail.

County Auditor's in Indiana have not uniformly applied the Indiana tax sale statutes. In neighboring St. Joseph County, the County Auditor mails notices to mortgagees, probably because the St. Joseph County Auditor recognized the fundamental unfairness of only providing constructive notice, and how simple a matter it was to mail notice to mortgagees of record. St. Joseph County v. Wilmes, Ind. App., 428 N.E.2d 103 (1981). However, because Indiana officials do not treat all mortgagees equally, the Indiana tax sale statutes, as applied to the Mennonite Board of Missions are unconstitutional. Cf. Yick Wo v. Hopkin, 118 U.S. 356 (1885)

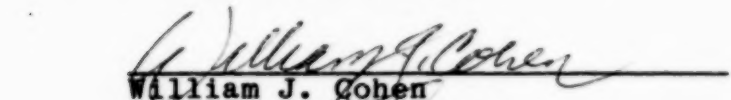
CONCLUSION

From the foregoing analysis, it is readily apparent that the Indiana tax sale statutes violate Due Process and Equal Protection. Thus this Court should reverse the decision of the Indiana Court of Appeals. This Court should further invalidate the tax sale to Adams with respect to the interests of the Mennonite Board of Missions and remand this case for further proceedings, not inconsistent with this decision.

Respectfully submitted,



C. Whitney Slabaugh



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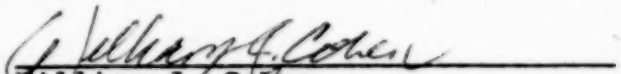
CERTIFICATE OF FILING AND SERVICE OF THE BRIEF OF APPELLANTS AND JOINT APPENDIX

I, WILLIAM J. COHEN, counsel for the Appellants, the Mennonite Board of Missions, and a member of the of the Bar of the United States Supreme Court, hereby certify:

1. That on the 23 day of December, 1982, I deposited at the United States Post Office, Elkhart, Indiana, first class postage prepaid and properly addressed to the Clerk of this Court, forty (40) copies of Appellant's Brief on the merits and Joint Appendix which is due on or before December 27, 1982.

2. That, in addition, I hand delivered to Robert W. Miller, counsel for the Appellee, at his address, 112 N. Second St., Elkhart, Indiana 46516, three (3) copies of Appellant's Brief on the merits and Joint Appendix.

3. That, in addition, I deposited at the United States Post Office, Elkhart, Indiana, first class postage prepaid and properly addressed to Linley E. Pearson, Attorney General for the State of Indiana, at his address, 219 State House, Indianapolis, Indiana 46204, three (3) copies of Appellant's Brief on the merits and Joint Appendix.



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